

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JACK SHANE)	
Claimant)	
VS.)	
)	Docket Nos. 265,067 & 265,698
TREASURE CHEST ADVERTISING)	
Respondent)	
AND)	
)	
CONTINENTAL CASUALTY COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed the October 1, 2001 Supplemental Decision entered by Administrative Law Judge Robert H. Foerschler.

ISSUES

Docket #265,067 is a claim for a February 23, 2001 back injury while lifting and holding press rollers. Docket #265,698 is a claim for an April 10, 2001 back injury while operating respondent's quarter-fold machine. These claims have been consolidated for trial.

On June 21, 2001, Judge Foerschler conducted a preliminary hearing. Following that hearing, the Judge entered an order dated June 27, 2001, in which the Judge did not decide claimant's request for preliminary hearing benefits but, instead, ordered an independent medical evaluation by a neutral physician, Dr. Glenn Amundson.

On September 11, 2001, Judge Foerschler's office received Dr. Amundson's August 8, 2001 medical report. On October 1, 2001, the Judge entered the Supplemental Decision in which the Judge awarded claimant the requested preliminary hearing benefits.

Respondent and its insurance carrier contend Judge Foerschler erred. They argue claimant did not injure his back working for respondent on either February 23 or April 10, 2001, and, therefore, the Board should reverse the October 1, 2001 Supplemental

Decision and deny the request for benefits. Moreover, they contend the Judge exceeded his jurisdiction by entering the Supplemental Decision without first granting respondent and its insurance carrier an opportunity to be heard regarding Dr. Amundson's report. They argue they have a right to cross-examine the doctor regarding an allegedly inaccurate patient history and that it was improper for the Judge to prevent that cross-examination. Accordingly, they request the Board to set aside the Supplemental Decision on that basis.

Conversely, claimant contends the Supplemental Decision should be affirmed.

The issues before the Board on this appeal are:

1. Did claimant either injure or aggravate his back working for respondent on February 23 and April 10, 2001?
2. If so, is claimant's present need for medical treatment related to his work-related injury?
3. Did the Judge err by issuing the Supplemental Decision without first granting respondent and its insurance carrier an opportunity to be heard or an opportunity to cross-examine Dr. Amundson?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, along with the parties' arguments and authorities, the Board finds and concludes:

On both February 23 and April 10, 2001, claimant injured his back working for respondent. On the former date, claimant hurt his back while helping lift and change a heavy metering roller. Despite that accident, claimant continued working for respondent but he was medically restricted to light duty activities. Claimant hurt his back on the latter date while lifting a lid on a machine. Claimant has not worked since that incident.

Although claimant strained his back at home in January 2001 when he slipped and fell, the symptoms from the fall soon resolved and claimant returned to work without restrictions, performing work that included pushing 5,000-pound rolls.

The Board concludes claimant sustained personal injury by accident arising out of and in the course of employment with respondent.

Based upon claimant's testimony, as well as the medical evidence compiled to date, the Board also concludes claimant's present need for medical treatment is related to his work-related injury. After having low back surgery in 1983, claimant's back was

asymptomatic for most of the time, except for symptoms after an automobile accident in the 1990s and falling on his buttocks in January 2001. Despite that surgery, claimant was able to perform strenuous labor without restrictions until the February and April 2001 accidents. Additionally, both Dr. Peter V. Bieri and Dr. Amundson have reported that claimant's present condition represents a new injury that occurred at work. The only medical opinion to the contrary is from Dr. Jeffrey T. MacMillan, who was hired by respondent and its insurance carrier. The Board notes Dr. MacMillan was told that claimant's present symptoms began in January 2001, which is contrary to the record.

The Board rejects respondent and its insurance carrier's argument that the Judge exceeded his jurisdiction in issuing the Supplemental Decision following receipt of Dr. Amundson's requested medical report. The Act gives the workers compensation judges the authority to obtain independent medical evaluations to assist them in their decisions. When ordered, such evaluations shall be considered by the judges.¹ The Act does not require a judge to grant the parties time to depose the neutral physician before the judge enters a preliminary hearing order. Although respondent and its insurance carrier argue they have been denied the right to cross-examine Dr. Amundson, the record does not reflect they ever requested Judge Foerschler to grant them time to depose the doctor.

At the June 2001 preliminary hearing, Judge Foerschler advised the parties he would probably appoint a neutral physician to evaluate claimant. On June 27, 2001, the Judge then appointed Dr. Amundson as a neutral physician to evaluate claimant and forward his findings to the Judge. That order did not address claimant's request for preliminary hearing benefits as it only addressed the independent medical evaluation.

Complying with the Judge's request, Dr. Amundson prepared an August 8, 2001 report, which was filed with the Judge on September 11, 2001. The doctor's report reflects that copies were also mailed to the parties' attorneys. After receiving the report, the Judge issued the Supplemental Decision dated October 1, 2001.

It is not uncommon for the workers compensation judges to take preliminary hearing requests under advisement while waiting for independent medical evaluations. Judge Foerschler did not specifically announce that he was taking claimant's request for preliminary hearing benefits under advisement until receiving Dr. Amundson's report, but that is what occurred. Although it is much preferred that the Judge make such announcements either on the record or in writing, Judge Foerschler did not err by entering the October 1, 2001 Supplemental Decision without additional notice to the parties or conducting another hearing.

¹ K.S.A. 44-516.

But respondent and its insurance carrier are not without relief. The legislative intent behind the Workers Compensation Act was to provide benefits to injured workers with minimal delay. Accordingly, preliminary hearings are intended to be held quickly and intended to be summary in nature. The Act does not limit the number of preliminary hearings that may be held and, thus, allows the workers compensation judge to hear additional evidence as it develops and to modify the preliminary hearing award as the facts dictate. Accordingly, respondent and its insurance carrier have the opportunity to present additional evidence to Judge Foerschler at a later hearing. Further, if it is determined upon a full presentation of the evidence that the Judge erred in awarding the preliminary hearing benefits, respondent and its insurance carrier can seek reimbursement from the Workers Compensation Fund.²

WHEREFORE, the Board affirms the October 1, 2001 Supplemental Decision entered by Judge Foerschler.

IT IS SO ORDERED.

Dated this ____ day of March 2002.

BOARD MEMBER

c: James L. Wisler, Attorney for Claimant
John David Jurcyk, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Workers Compensation Director

² K.S.A. 44-534a(b).